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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

OBESITY RESEARCH INSTITUTE, LLC,

Plaintiff & Counterclaim-Defendant,

v.

FIBER RESEARCH INTERNATIONAL,  
LLC,

Defendant & Counterclaim-Plaintiff.

Case No. 15-cv-595-BAS-MDD

**APPLICATION TO FILE UNDER SEAL  
THE EXHIBITS TO THE  
DECLARATION OF MELANIE  
PERSINGER IN SUPPORT OF FIBER  
RESEARCH'S MOTION TO RETAIN  
CONFIDENTIALITY**

Judge: Hon. Mitchell D. Dembin

Courtroom: 1E

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT, in accordance with Local Rule 79.2, defendant and  
3 counter-claimant Fiber Research International, LLC hereby applies for an order allowing it  
4 to file under seal Exhibits 1-8 to the Declaration of Melanie Persinger in Support of Fiber  
5 Research's Motion to Maintain Confidentiality (Dkt. No. 77-2).

### 6 **INTRODUCTION**

7 On October 23, 2015, the Court entered a Protective Order in this action. (Dkt. No. 67.)  
8 The Protective Order permits parties to designate as "Confidential" "information (regardless  
9 of how it is generated, stored or maintained) or tangible things that qualify for protection  
10 under Federal Rule of Civil Procedure 26(c)" (*id.* ¶ 2.2), including "trade secret or other  
11 confidential research, development, or commercial information," Fed. R. Civ. P. 26(c). The  
12 Protective Order further permits the parties to designate as "highly confidential – attorneys'  
13 eyes only" "extremely sensitive 'Confidential Information or Items,' disclosure of which to  
14 another Party or Non-Party would create a substantial risk of serious harm that could not be  
15 avoided by less restrictive means." (*Id.* ¶ 2.8.) Under the Protective Order, the parties have  
16 agreed to apply to file such confidential information under seal. (*See id.* ¶¶ 12.3-12.4.)  
17 Because the Declaration of Melanie Persinger in Support of Fiber Research's Motion to  
18 Retain Confidentiality attaches documents designated by Fiber Research as "HIGHLY  
19 CONFIDENTIAL – ATTORNEYS' EYES ONLY," Fiber Research applies to file these  
20 documents under seal.

### 21 **ARGUMENT**

22 "[T]he Supreme Court recognize[s] a federal common law right 'to inspect and copy  
23 public records and documents.' This right extends to pretrial documents filed in civil cases .  
24 . . ." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (quoting  
25 *Nixon v. Warner Commc'ns.*, 435 U.S. 589, 597 (1978)). Although there is a "presumption in  
26 favor of access to court records," *id.* at 1135 (citation omitted), that presumption "does not  
27 extend to 'sealed discovery document[s] attached to . . . non-dispositive motion[s].'" *In re*  
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*Nat'l Sec. Agency Telecommunications Records Litig.*, 2007 WL 549854, at \*2 (N.D. Cal. Feb. 20, 2007) (citing *Kamakana v. City & County of Honolulu*, 447 F3d 1172, 1179 (9th Cir. 2006)). Moreover, even when the public access presumption does apply, the presumption is rebutted when those documents are “among those which have ‘traditionally been kept secret for important policy reasons,’” *Kamakana*, 447 F3d at 1134 (quoting *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)).

Here, Fiber Research has designated as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” documents which contain “extremely sensitive ‘Confidential Information or Items,’” including “trade secret or other confidential research, development, or commercial information,” (*See* Protective Order ¶¶ 2.2, 2.8; Fed. R. Civ. P. 26(c)). These documents must be attached to Fiber Research’s Motion to Retain Confidentiality, which is not a dispositive motion, so that the Court may review them and assess their designations in ruling on the motion. Moreover, “[u]nless the Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality . . . all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party’s designation until the court rules on the challenge.” (Protective Order ¶ 6.3.) Accordingly, because Fiber Research has not waived its confidentiality designations, and is attaching the confidential documents to a non-dispositive motion, the Court should grant its application to file these documents under seal.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Fiber Research’s application to file under seal Exhibits 1-8 to the Declaration of Melanie Persinger in Support of Fiber Research’s Motion to Retain Confidentiality.

Dated: December 15, 2015      Respectfully submitted,

/s/ Jack Fitzgerald

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